IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 77-1762

EDDIE THOMPSON, JR.,

Petitioner,

v.

HAROLD E. SHAW

and

SHA-MOT, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

EDDIE THOMPSON, JR., Pro Se

736 Highland Avenue
Covington, Kentucky 41011
1-606/491-6278

I hereby certify that 3 copies of the foregoing petition have been served by the United States mail, upon: Mr. Daniel E. Connaughton, Law Building, 119 Court Street, Hamilton, Ohio 45011 on this ..... day of June, 1978.

.....
Eddie Thompson, Jr., Pro Se

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CITATIONS

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Petitioner, Eddie Thompson, Jr., respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above styled case on March 13, 1978; petition for rehearing denied on May 19, 1978.

OPINION BELOW

The opinion of the United States District Court for the Southern District of Ohio — Western Division was entered on May 5, 1976. That court entered judgment for the

defendants-respondents and ordered that defense counsel apologize to the plaintiff-petitioner for default in the pleadings and the delay in answering interrogatories and that the defendants pay the costs herein. Pages 9a-10a.

The Court of Appeals affirmed the judgment of the District Court concluding that the finding by the District Court was not "clearly erroneous." Pages 12a-13a. The Court of Appeals denied rehearing on May 19, 1978. Page 11a.

JURISDICTION

The jurisdiction of this court is invoked pursuant to 28 U.S.C. 1254 (1). The order appealed from being entered on March 13, 1978. Pages 12a-13a.

QUESTIONS PRESENTED

(1) Did the Court follow the three-step procedure set out in a unanimous United States Supreme Court decision in *McDonnell Douglas Corporation* v. *Green,* 411 U.S. 792 (1973) or the Sixth Circuit's own decision in *Franklin* v. *Troxel Manufacturing,* 501 F.2d 1013.

(2) What evidence was presented to justify defendants'-respondents' discriminatory firing of plaintiff-petitioner.

(3) Were the District Court's findings "clearly erroneous."

(4) Did the District Court err in not determining whether petitioner was job superintendent or not.

(5) Were the Trial Court's findings based upon substantial evidence or proper view of the law.

STATEMENT

In the instant case petitioner Thompson, Respondents Harold Shaw and Mr. Mott, and Mr. Winkler worked for Griesemer and Associates. Griesemer and Associates went bankrupt.

Petitioner Thompson was working as a job superintendent in Ross, Ohio at the time of the bankruptcy. Mr. Shaw, Mr. Mott, and Mr. Winkler were working in Indianapolis, Indiana, at the time. Mr. Shaw and Mr. Mott formed a corporation to complete the work Griesemer and Associates had under contract for the bonding company. Petitioner Thompson had been superintendent in Ross, Ohio, from the beginning of the job.

Mr. Shaw and Mr. Mott had agreed with the bonding company to endeavor to supervise and make such further arrangement as necessary with subcontractors and suppliers previously engaged by Griesemer and Associates.

Mr. Shaw had told petitioner Thompson he would remain as job superintendent, but once Mr. Shaw gained control of the job, he arbitrarily replaced Thompson with Winkler as superintendent because he did not want a black as superintendent.

At the trial defendant-respondents recognized that they must articulate some legitimate, nondiscriminatory reason for firing. *McDonnel Douglas Corporation* v. *Green,* 36 L.Ed. 2d 668; *Franklin* v. *Troxel Manufacturing,* 501 F.2d 1013. They claimed petitioner was insubordinate. They could not present any evidence to support this claim.

Respondents claimed they were short of money. They did not present any evidence to support this claim, either. In fact, respondents admitted they fired plaintiff-petitioner for no good cause.

REASONING FOR GRANTING WRIT

The lower Court's decision was so far departed from the accepted and usual course of judicial proceedings. The Sixth Circuit's sanctioning of such departure calls for an exercise of this Court's power of supervision.

The Trial Court's findings were not based on substantial evidence, nor were they based on a proper view of the law. *Federal Rules of Civil Procedure,* Rule 52 (a).

The Court cited *McDonnell Douglas* v. *Green,* supra, and *Franklin* v. *Troxel Manufacturing Company,* supra, and carefully followed their guidelines in ruling on burden of proof at various stages of the case. The *McDonnel* and *Franklin* cases held that once a prima facie case of Title VII violation has been established, the burden shifts to the defendants to articulate legitimate, non-discriminatory reasons for unequal treatment shown in the prima facie case. The defendants must prove their justification by a preponderance of evidence. *Franks* v. *Bowman Transportation,* 47 L.Ed. 2d 444; *United States* v. *International Union of Elevator Constructors,* 538 F.2d 1012.

Where there was a failure to present evidence and meet the burden of proof, the District Court's findings were clearly erroneous in a tax case involving reasonable deductible business expense. *Tulia Feedlot, Inc.* v. *United States,* 513 F.2d 800.

The approval by the court below of the trial court's decision makes a travesty of the plain meaning of *42 U.S.C. 2000e.*

CONCLUSION

This court should grant the petition for certiorari and hear the issues raised in these important areas of Civil Rights and unlawful employment practices.

Eddie Thompson, Jr., pro se

APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

NO. C-1-75-45

EDDIE THOMPSON, JR.,
Plaintiff,

v.

HAROLD E. SHAW,
SHAW-MOTT, INC.,
Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Filed May 4, 1976)

PORTER, J.:

FINDINGS OF FACT

This cause came on to be tried on plaintiff's Title VII claim of employment discrimination. 42 U.S.C. § 2000e, *et seq*. (1970). Specifically, plaintiff alleged that he was fired from his position as job superintendent on the Butler County Waterworks Project because of his race by defendants Harold Shaw and Shaw-Mott, Inc. Plaintiff seeks special damages in the amount of $12,744 for loss of pay as job superintendent for 36 weeks, $2,000 for loss of unemployment benefits, $500 for loss of tools and equipment stolen and not replaced, $15,000 for loss of job superintendent status, and $750 for costs. Defendants moved for a separation of witnesses, which request was granted.

The Butler County Waterworks Project was begun as a joint venture by Griesemer and Associates and Paicely and Associates. Griesemer and Associates were on this project until February, 1971, when that company filed bankruptcy. Mr. Shaw was vice-president of Griesemer and Associates and was in charge of bidding for jobs in Indiana. Mr. Mott was a field superintendent for Griesemer and Associates and ran the field for that company, except in Ohio where Mr. Griesemer ran it himself. There is a conflict over what plaintiff's role with the Griesemer Company was. He claims he was job superintendent on the Waterworks Project, that he started the Project himself, and that he was the on-the-job overseer and corodinator for the whole one-half million dollar job. Defendants claim that in light of his having no prior experience as a job superintendent, he could not have possibly been placed in such a position. They claim he was employed as a carpenter foreman at this Project. There was testimony by a witness who was a basement contractor on this job, to the effect that plaintiff was job foreman. It is not necessary for us to decide what plaintiff's exact position was with Griesemer and Associates as that point does not go to the issue of this suit, namely, was plaintiff hired and fired by defendants because he was black.

Sometime after Griesemer and Associates filed bankruptcy, Travelers Insurance Company, the bonding company involved, contacted Mr. Shaw to inquire if he would be interested in finishing certain jobs Griesemer had started. As Mr. Shaw was familiar with the inside office operations of the business and Mr. Mott was familiar with the field aspects, they decided to form a corporation and to work with Travelers to complete these jobs. The corporation was formed sometime in March, 1971 (Mr. Shaw testified March 15 and Mr. Mott testified March 21).

The corporation operated out of the basement of Mr. Shaw's home and the capitalization of the corporation was $8000. Mr. Shaw was president, Mr. Mott was vice-president, and Mrs. Mott, secretary.

Travelers, anxious to keep the jobs progressing, told Mr. Shaw to pay all persons working on the Butler County Waterworks Project during an interim period until Shaw-Mott, Inc. and Travelers could firm up a contract for this particular job. Shaw-Mott, Inc. complied and was promptly reimbursed by Travelers on a time and materials basis.

In the first 30 to 45 days after incorporating, defendants were busy trying to get bids on two other uncompleted jobs started by Griesemer so that they could quote a set price to Travelers and enter into a firm contract. During this time, plaintiff was paid by Shaw-Mott, Inc. but Shaw-Mott, Inc. was being reimbursed weekly for this on a time and materials basis.

There was an initial meeting between plaintiff and Mr. Shaw sometime in March, 1971, at which time plaintiff was told by Mr. Shaw that defendants were going to keep paying the men as per instructions from Travelers. Plaintiff's pay continued to be $1.00 over scale. The reason his pay was what it was is disputed. Plaintiff says he was paid that rate by defendants because he was job superintendent. Defendants testified that is what plaintiff told them Griesemer had been paying him and they just continued to pay him at that rate. It is not necessary to resolve why plaintiff was paid at this rate as the point is not relevant to the issues at hand. Mr. Shaw testified that at this initial meeting he advised plaintiff that there would be some changes once Shaw-Mott, Inc. took over. Plaintiff did not testify regarding this initial meeting.

The second meeting which, according to the plaintiff, took place on March 20 or 21, 1971 (Mr. Mott testified

it was two or three weeks prior to the date on which plaintiff was fired — April 26), is another source of dispute. Both Mr. Shaw and Mr. Mott were present at this meeting. Plaintiff testified that the position of job superintendent was discussed and that Mr. Shaw indicated he wanted to make a change to get someone who could represent them better. Plaintiff stated that he did not like this and at the end of the meeting Mr. Shaw told him he was still job superintendent. Both Mr. Shaw and Mr. Mott testified that Mr. Shaw offered plaintiff an opportunity to bid on the general construction portion of the job. Both Mr. Shaw and Mr. Mott testified that they were mechanical subcontractors and were going to have to sub out the general construction work, sheet metal work, *e.g.*, those trades about which they did not feel competent to handle themselves. They were taking bids on various parts of the job from other subs because they had to submit a firm price for the total job to Travelers before they could obtain a contract with Travelers.

Both Mr. Shaw and Mr. Mott testified that plaintiff was not responsive to their offer to bid on the general construction part of the job. They said he refused the offer and that he told them he was superintendent and that he worked by the hour. Thereafter, the general construction was subcontracted to WAECO Construction Company by Shaw-Mott, Inc.

On or about March 23, 1971, according to the plaintiff, and sometime later, according to Mr. Mott, Mr. Winkler came on the job. Mr. Shaw and Mr. Mott testified that Mr. Winkler was put on the job as plumbing superintendent or foreman while plaintiff testified that Mr. Winkler was also job superintendent. According to Mr. Shaw's testimony, Mr. Mott was defendants' superintendent if in fact they had such a designated position. Mr. Shaw

testified that they did not feel the need for a superintendent and that if there was a question the employees were supposed to go to the particular job foreman or Mr. Mott. Plaintiff testified that he told everybody on the job that Mr. Winkler took his job as job superintendent. Plaintiff further testified that Mr. Winkler denied he (Winkler) was job superintendent.

The next relevant date was April 26, 1971, on which date plaintiff was told he would no longer be needed by Mr. Shaw. Mr. Shaw and Mr. Mott testified that they subcontracted the general construction work out to WAECO Construction Company and plaintiff's position was no longer in existence. Mr. Mott testified that when plaintiff was let go, Travelers had accepted their price for the whole job on a verbal basis (which was compiled in part on a bid submitted by WAECO). Mr. Mott testified that plaintiff was fired because he said he worked by the hour, would not bid on the general construction portion of the job, and therefore was no longer needed by defendants.

After the date of the firing, plaintiff continued to come to the job site and according to Mr. Shaw's testimony, threatened Mr. Winkler. After no trespassing signs were put up, plaintiff was arrested when he next came back on the job site.

Later plaintiff applied for unemployment benefits but was denied them because of a complaint filed by defendants with the Ohio Bureau of Employment Services, Claim Section, in which it was stated that acts of insubordination were among the reasons for plaintiff's dismissal.

CONCLUSIONS OF LAW

The law to be applied in this case was set out in *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792 (1973). A unanimous United States Supreme Court laid down a three-step procedure for the determination of racial employment discrimination cases under Title VII. Initially, the complainant must carry the burden of proving a *prima facie* case. In the instant case, plaintiff must show that he belongs to a racial minority which he has done. Plaintiff must also show that he held a job with an employer and that from such job he was fired on account of his race. The burden then shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the firing." *McDonnell Douglas, supra.* The third step involves allowing the plaintiff to have the opportunity of proving that an otherwise valid reason for the firing was used as a pretext. This three-step procedure was also followed by the Sixth Circuit Court of Appeals in *Franklin* v. *Troxel Manufacturing Company,* 501 F.2d 1013 (6th Cir. 1974).

Applying this to the instant case, we find that plaintiff has shown he is black. We find that plaintiff has not demonstrated he was ever hired by Mr. Shaw or Shaw-Mott, Inc., the defendants. Plaintiff worked in an interim period during which time Shaw-Mott, Inc. paid him but which payment was actually made by Travelers Insurance, the bonding company. As soon as Shaw-Mott, Inc. took over the job as the formal employer and not as an intermediary for Travelers, the general construction part of the job (in which area plaintiff was working during the interim period) was subbed out to WAECO Construction Co. Mr. Shaw informed plaintiff he was no longer needed as WAECO now had jurisdiction over the matter of plaintiff's work. It has not been shown that plaintiff was ever formally hired by defendants even though in the unique

circumstances it was Mr. Shaw who told plaintiff he was no longer needed (or as the term is loosely used earlier in this opinion – fired plaintiff).

Even if it were assumed that plaintiff was working for defendants, which we have decided he was not, the defendants have sustained their burden of proving that they had a legitimate non-discriminatory reason for firing plaintiff, namely, his former job was eliminated. They no longer had a job superintendent, if that was in fact plaintiff's former position. Each subcontractor had its own foreman, who reported to Mr. Mott. Plaintiff has not shown that the reason he was fired, again assuming he was hired, is pretextual.

Before concluding certain comments seem in order. First, nothing herein is to be construed as indicating that the Court finds any justification for the fact that Shaw-Mott, Inc., answered the request to the employer for wage and separation information to the Ohio Bureau of Employment Services in the way it did (px 2). On that form the bookkeeper reported that Mr. Thompson was fired for insubordination and failure to comply with company policies. As a result Mr. Thompson did not get unemployment compensation. There is no evidence that he pursued his claim. There is evidence that Mr. Thompson did not appeal. Part of his claim for damages is on account of the employers' part in the denial of unemployment compensation. We know of no remedy available to one in the plaintiff's position except to press his claim before the Unemployment Compensation Division of the Ohio Bureau of Employment Services and, if the decision of the Commission is adverse, to appeal to the state courts (ORC § 4148.28 (O)).

Though the employers' report seems ill-advised, it does corroborate that after the abolishment of his job plaintiff did, as he testified, tell everyone on the job that he had been fired; that the job would not be completed unless he was job superintendent; that finally "no traspassing" signs were posted, and when he refused to comply with the warning contained thereon, he was arrested and found guilty of trespass. (He must have been found guilty of trespass because he testified that the Judge fined him and the fine was suspended on the condition that he stay away from the job site.)

Next, we extend this discussion to make clear that nothing herein is to be taken as a reflection on the plaintiff's ability and capacity to be a job superintendent. His qualifications are attested to by a letter from his union (px 1).

Next, the contract between Shaw-Mott, Inc., and Travelers shows that it was for an amount certain. This Court finds clear and convincing the testimony of the principals in Shaw-Mott, Inc., that it was absolutely necessary, in view of the fact that they were starting on a shoestring financially, to have all the work, except the mechanical, subcontracted. If Shaw-Mott had not done this, as aptly stated by one of the principals, they would have been "broke" before they started.

Finally, we observe that the plaintiff acted *pro se*. He did so with competence and was earnest in his presentation. He was extended every consideration by the Court.

Plaintiff complained of a lack of consideration on the part of defendants' counsel, noting that defendants were in default for answer and had to be ordered by the Magistrate to answer interrogatories. These late answers prompted a late request for admissions, because the answers to plaintiff's interrogatories were received shortly

before trial. These requests had to be answered at trial. The contracts with Travelers to complete the job and to keep things going in the interim were not furnished to plaintiff until after the Court hearing, with leave.* Characteristically, there is no indication that copies were furnished to the plaintiff.

We think these omissions should not go unnoticed and defendants' counsel should apologize appropriately to the plaintiff. The only other sanction the Court finds available in the circumstances is that the defendants pay the costs.

Accordingly, the Clerk is ordered to enter judgment in favor of the defendants and that order should provide that defense counsel apologize to the plaintiff for the default in the pleading and the delay in answering interrogatories. As indicated above, the order should also provide that the defendants pay the costs herein.

/s/ DAVID S. PORTER
United States District Judge

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* The post-trial submissions show that the financing contract with Travelers was dated March 31, 1971, and the formal contract with Travelers and Shaw-Mott to complete the jobs was dated May 6, 1971 (dx 7 and dx 8).

UNITED STATES DISTRICT COURT
for the
SOUTHERN DISTRICT OF OHIO,
WESTERN DIVISION – CINCINNATI, OHIO

Civil Action File No. C-1-75-45

EDDIE THOMPSON, JR.,

vs.

SHA-MOT, INC.

JUDGMENT

(Filed May 5, 1976)

This action came on for trial before the Court, Honorable DAVID S. PORTER, United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is Ordered and Adjudged that judgment be entered in favor of the defendants, and that the defense counsel apologize to the plaintiff for the default in the pleading and the delay in answering interrogatories and that the defendants pay the cost herein.

Dated at Cincinnati, Ohio, this 5th day of May, 1976.

JOHN D. LYTER
Clerk of Court

By: /s/ DANIEL J. LYONS, JR.
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 76-2184

EDDIE THOMPSON, JR.,
Plaintiff-Appellant,

v.

HAROLD E. SHAW and
SHA-MOT, INC.,
Defendants-Appellees.

ORDER DENYING PETITION FOR HEARING

(Filed May 19, 1978)

Before: PHILLIPS, Chief Judge, KEITH and MERRITT, Circuit Judges.

No judge of the Court having moved for rehearing en banc, the petition for rehearing has been referred to the hearing panel for disposition.

Upon consideration, it is ORDERED that the petition for rehearing be and hereby is denied.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NO. 76-2184

EDDIE THOMPSON, JR.,

Plaintiff-Appellant,

v.

HAROLD E. SHAW and
SHA-MOT, INC.,

Defendants-Appellees.

ORDER

(Filed March 13, 1978)

Before: PHILLIPS, Chief Judge, KEITH and MERRITT, Circuit Judges.

The District Court found that the defendants, appellees here, did not racially discriminate against plaintiff in employment, and our review of the District Court's opinion, the briefs of the parties and the record as a whole indicates that there is substantial evidence to support the District Judge's findings that the defendants took over a construction job after partial completion when the original contractor became bankrupt and refused to continue plaintiff's employment for reasons of economy, not race. Such findings by the District Court are not "clearly erroneous," the standard we must apply in reviewing the District Court's resolution of the factual dispute between the

parties; and we therefore affirm the judgment of the District Court. No costs shall be taxed.

ENTERED BY ORDER OF THE COURT

John P. Hehman, Clerk

By /s/ GRACE KELLER
Chief Deputy

Issued as Mandate: June 1, 1978
COSTS: NONE

[DULY CERTIFIED]